NO. 77-6910

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

BENSON JOSEPH DONOHO, PETITIONER

-v-

UNITED STATES OF AMERICA

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Benson Joseph Donoho, pursuant to Rule 53, Supreme Court Rules, and Title 18 U.S.C. §3006A(d)(6), respectfully moves this Honorable Court for leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel undersigned was appointed by the United States District Court for the District of Arizona to represent the petitioner for purposes of appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted: June 8, 1978.

THOMAS W. O'TOOLE
Federal Public Defender
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230 North First Avenue
Phoenix, Arizona 85025
Telephone: 602-261-3561

Attorney for Petitioner

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

BENSON JOSEPH DONOHO, PETITIONER

-v-

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BENSON JOSEPH DONOHO
Petitioner

I N D E X

C A S E S

C A S E S (cont'd.)

S T A T U T E S

A M E N D M E N T S

R U L E S

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. _____

BENSON JOSEPH DONOHO, PETITIONER

-v-

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

Petitioner, Benson Joseph Donoho requests that a writ of certiorari issue to review the May 12, 1978, opinion of the United States Court of Appeals for the Ninth Circuit, San Francisco, California (Docket #77-1999), affirming the judgment of conviction of the petitioner by the United States District Court for the District of Arizona, Phoenix, Arizona.

OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Ninth Circuit, No. 77-1999, May 12, 1978, is attached and hereinafter referred to as Appendix I.

JURISDICTION

On May 12, 1978, the United States Court of Appeals for the Ninth Circuit in cause number 77-1999, affirmed the petitioner's judgment of conviction by the United States District Court for the District of Arizona, Phoenix, Arizona.

The petitioner submits that Title 28, United States Code, §1254(1) confers jurisdiction on this Court. Jurisdiction

is further based on Rule 19(1)(b), Supreme Court Rules, because the United States Court of Appeals for the Ninth Circuit has:

> "(1) ... decided a federal question in a way in conflict with applicable decisions of this Court ... (and)
>
> (2) ... rendered a decision in conflict with another Court of Appeals on the same matter; ..."

QUESTION PRESENTED FOR REVIEW

WHETHER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND RULE 405(b), FEDERAL RULES OF EVIDENCE, REQUIRE ADMISSION BY THE DEFENSE OF CHARACTER TESTIMONY RELATING TO SPECIFIC INSTANCES OF CONDUCT WHERE ENTRAPMENT IS RAISED AS A DEFENSE.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that:

> "No person shall ... be deprived of life, liberty, or property without due process of law;..."

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor ..."

STATEMENT OF THE CASE

[Clerk's Record on Appeal will be referred to as "C.R."; Reporter's Transcript of Proceedings will be referred to as "R.T."]

A. District Court Proceedings:

On February 22-25, 28, 1977, in the United States District Court for the District of Arizona, the Honorable Leo Brewster, Sitting by Designation, presiding, the petitioner was convicted following a jury trial of Counts IV, V and VI of an indictment charging him with a violation of Title 26 U.S.C. §5861(d) and §5871, and Title 18 U.S.C. §2, Possession of an Unregistered Firearm and Aiding and Abetting; and Title 28 U.S.C. §5861(i) and §5871, and Title 18 U.S.C. §2, Possession

of an Unserialized Firearm and Aiding and Abetting; and Title 26 U.S.C. §5861(e) and §5871, Transfer of a Firearm Without Filing a Written Application. (Indictment, C.R. 10-12; Verdicts, C.R. 169) On motion of the government, Counts I, II and III of the indictment were dismissed prior to trial. (C.R. 75-76)

On March 28, 1977, the petitioner was adjudged guilty as charged and committed to the custody of the Attorney General for a period of two years on each count, to run concurrently. The execution of sentence was suspended and the petitioner was placed on probation for a period of two years from the date of judgment. (C.R. 179)

On April 5, 1977, the petitioner filed his Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. (C.R. 180; Order Appointing Federal Public Defender as counsel on appeal, C.R. 187)

On May 12, 1978, the United States Court of Appeals for the Ninth Circuit affirmed the petitioner's conviction in an opinion attached hereto as Appendix I.

A Petition for Rehearing has been filed and is pending before the United States Court of Appeals for the Ninth Circuit.

B. Statement of Facts:

The petitioner proceeded to trial on Counts IV, V and VI of the indictment, which counts alleged that the petitioner unlawfully possessed and transferred a .22 Caliber Maxim silencer in violation of Title 26 U.S.C. §5861(d)(i)(e), §5871 and Title 18 U.S.C. §2. Each count involved the same .22 Caliber Maxim silencer.

At the conclusion of the government's case, which consisted of testimony from Edward J. Vercelli, a government informer and Daniel Ryan and Robert Scroggie, two special agents for the Bureau of Alcohol, Tobacco and Firearms (A.T.F.), the petitioner took the stand and presented an entrapment defense.

The defendant called four witnesses who testified or would have testified as to the following specific acts of conduct evidencing the petitioner's lack of predisposition to

violate firearm laws:

(1) As reflected in the offer of proof at R.T. III/222, the petitioner attempted to call Bob Short, a local law enforcement officer. Mr. Short would have testified that in September, 1975, two months prior to the petitioner's alleged gun violations, the petitioner voluntarily informed local law enforcement officers that an individual had attempted to sell him a truckload of weapons. The petitioner supplied the officers with information as to the serial numbers and types of weapons. Mr. Short determined that one such weapon was stolen. On October 29, 1975, the petitioner supplied Officer Short with information concerning a military machine gun smuggling ring out of Luke Air Force Base. Short turned this information over to the Bureau of Alcohol, Tobacco and Firearms for further investigation.

(2) The defense attempted to call Harry Koch, a detective for the Maricopa County Sheriff's Office. Koch would have testified that in 1975 he purchased weapons from a pawn shop in Phoenix, Arizona, where the petitioner had been employed on several occasions. Koch requested permission to step outside of the store to view the guns in the light. The petitioner, in compliance with federal regulations, always required Koch to sign a release form and purchase the weapon before leaving the store with the weapon. (R.T. III/219-221)

(3) The defense attempted to call John Adams, a special agent with the United States Customs Service, who would have testified that in July, 1974, the petitioner assisted him in the investigation of two neutrality violators who had illegally exported firearms purchased at the petitioner's pawn shop. (R.T. III/180)

(4) The defense attempted to call John Gannoway, a salesman at Arizona Shooters Supply. He would have testified that in 1975 he and the petitioner often discussed the possibility of obtaining automatic weapons -- potentially illegal weapons if not registered. The petitioner always stated that said weapons would be lawfully purchased and possessed.

The petitioner contended that the above-mentioned specific acts of conduct were admissible under Rule 405(b), Federal Rules of Evidence, as evidence of the petitioner's lack of predisposition to violate the gun laws. (R.T. III/219-220)

The District Court ruled that specific instances of conduct reflecting the petitioner's lack of predisposition are inadmissible even where entrapment is alleged as the defense. (R.T. III/198)

In affirming the District Court, the Court of Appeals reasoned:

> "If character or a trait of character is an essential element of the defense of entrapment, then the District Court should have admitted relevant testimony of specific instances of conduct [pursuant to Rule 405(b)]." (P. 2 of Appendix I)

However, the appellate court held:

> "But character or a character trait is not an essential element of the entrapment defense. That defense has two elements -- a government official must have induced the defendant to commit the crime; and the defendant must not have been predisposed to commit the crime ... Neither element concerns character or a character trait." (Pp. 2-3 of Appendix I) (Emphasis added)

REASONS FOR GRANTING THE WRIT

THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND RULE 405(b), FEDERAL RULES OF EVIDENCE, REQUIRE ADMISSION BY THE DEFENSE OF CHARACTER TESTIMONY RELATING TO SPECIFIC INSTANCES OF CONDUCT WHERE ENTRAPMENT IS RAISED AS A DEFENSE.

At trial the petitioner raised the defense of entrapment. Specifically, the petitioner contended that a government undercover agent and his informer induced the petitioner into committing the alleged firearms offenses.

The Supreme Court has dealt with the defense of entrapment in three leading cases, each of which indicates that the crucial element of the defense is the accused's predisposition to commit the crime. Sorrells v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369 (1958); United States v. Russell, 411 U.S. 423 (1973).

The courts have also held that entrapment is an affirmative defense. The defendant must come forward with evidence of his non-predisposition and government inducement. United States v. Demma, 523 F.2d 981, 985 (9th Cir., 1975); United States v. Hermosillo-Nanez, 545 F.2d 1230 (9th Cir., 1976), cert. denied, 429 U.S. 1050 (1977). Once the entrapment defense is put in issue, the government has the burden of establishing beyond a reasonable doubt that entrapment did not exist, i.e., the accused was predisposed to commit the violation. United States v. Glassel, 488 F.2d 143, 146 (9th Cir., 1973), cert. denied, 416 U.S. 941 (1974).

It is well settled law that once a defendant raises the issue of entrapment the prosecution may meet its burden of showing predisposition through inquiry into prior similar acts or convictions by the defendant. United States v. Ambrose, 483 F.2d 742 (6th Cir., 1973); Pulido v. United States, 425 F.2d 1391 (9th Cir., 1970); Whiting v. United States, 296 F.2d 512 (1st Cir., 1961). Prosecutors may also rely upon previous related misdemeanor or felony offenses for which the accused had neither been convicted nor arrested as evidence of predisposition. Carlton v. United States, 198 F.2d 795 (9th Cir., 1952).

This case raises the question of what type of evidence the defense may proffer to meet its initial burden in an entrapment defense by showing a lack of predisposition to commit the alleged offense. The District Court and Court of Appeals limited such proof to general opinion or reputation testimony concerning the petitioner's lack of predisposition to violate gun laws. Both courts specifically held that relevant testimony of specific instances of conduct were inadmissible to meet the initial showing of non-predisposition. (District Court -- R.T. III/181-182, 188, 198, 221; Court of Appeals -- Opinion, Appendix I, pp. 2-3) Rule 405(b), Federal Rules of Evidence, provides:

> "(b) In cases in which character or a trait of character of a person is an essential element of a ... defense, proof may also be made of specific instances of his conduct."

One's character or predisposition to act in a certain way under specific circumstances is an essential element to the defense of entrapment. As defined in Frase v. Henry, 444 F.2d 1228 (10th Cir., 1977):

> "'Character' is a generalized description of one's disposition in respect to a general trait such as honesty, temperance or carefulness ... [It] designates a particular kind of situation with a certain type of conduct ..." Id. 1232 (Emphasis added)

At least three circuits have held that "character" is an essential element to the defense of entrapment. The Fifth Circuit in Accardi v. United States, 257 F.2d 168 (5th Cir., 1958), cert. denied, 358 U.S. 883 (1958), in applying the rationale of Sorrells v. United States, supra, and Sherman v. United States, supra, held:

> "To determine whether entrapment has been established a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. This rationale throws the main emphasis on the 'predisposition' of the accused to commit the crime. We take it that 'predisposition' means something more than 'disposition' and is intended to refer to the character and intentions 1/ of the accused as an 'unwary innocent' ..." Id. 171 (Emphasis added)

The First Circuit in Whiting v. United States, 296 F.2d 512, 517 (1st Cir., 1961), has held that predisposition is a term which embraces both the character and intention of the defendant and can be proved through general reputation testimony or relevant prior conduct.

Finally, in an earlier discussion not cited in this case, the Ninth Circuit in United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir., 1977), recognized that the term predisposition as applied in entrapment defenses signifies a trait

1/ Predisposition as embodied in an entrapment defense includes the defendant's intent at the time of the commission of the act. Rule 404(b), Federal Rules of Evidence, sanctions the use of evidence of other acts to prove the intent of the accused. Therefore, alternatively, under Rule 404(b) the petitioner was entitled to offer the above-mentioned testimony concerning his similar prior acts to prove that he lacked the intent or predisposition to violate the gun laws.

of the accused's character:

> "Sorrells and Sherman reveal a number of factors which must be considered in determining whether the defendant was a person 'otherwise innocent' in whom the Government implanted the criminal design. Among these are the character or reputation of the defendant, including any prior criminal record ..." Id. 1336 (Emphasis added)

As character is an essential element to the defense of entrapment, the Court of Appeals and District Court erred under Rule 405(b) in holding inadmissible the relevant testimony of specific instances of conduct concerning the petitioner's lack of predisposition to violate the gun laws. 2/ In so holding, the petitioner's rights to due process and a fair trial as embodied in the Fifth and Sixth Amendments to the Constitution of the United States were violated.

In Washington v. Texas, 388 U.S. 14, 19 (1967), this Court held:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental right of due process of law. 3/

2/ As discussed above, the prior acts which the petitioner attempted to have admitted into evidence were specifically limited to transactions involving firearms or law enforcement assistance in firearm investigations. All of the prior acts occurred within the same locale of Phoenix, Arizona, and within one year of the commission of the offenses alleged in the indictment.

3/ In Chambers v. Mississippi, 410 U.S. 284, 302 (1973), this Court held that "few rights are more fundamental than that of an accused to present witnesses in his own behalf".

In United States v. Melchor-Moreno, 536 F.2d 1042, 1046 (5th Cir., 1976), the Court stated:

> "Despite the limitations of its wording, the [Sixth] Amendment is held to embrace not only the right to bring witnesses to the courtroom, but also, in appropriate circumstances, the right to put them on the stand. As the Court in Washington said, '[t]he framers of the constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use'."

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit prohibiting testimony of prior similar acts where entrapment is raised as a defense violated the petitioner's Fifth Amendment right to due process and Sixth Amendment right to a fair trial as well as Rule 405(b), Federal Rules of Evidence. In addition, the appellate court's decision conflicts with decisions of this Court, the First and Fifth Circuits and a prior decision of the Ninth Circuit. For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition and issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and to thereafter reverse his conviction and order a new trial.

Respectfully submitted: June 8, 1978.

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Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

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-v-

UNITED STATES OF AMERICA

AFFIDAVIT OF SERVICE

THOMAS W. O'TOOLE, Federal Public Defender, being first duly sworn, upon his oath, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served one copy of the following documents on the United States Attorney for the District of Arizona, Phoenix, Arizona 85025; and has forwarded by mail, two copies of the same to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 8th day of June, 1978:

(1) Motion for Leave to Proceed in Forma Pauperis;

(2) Petition for Writ of Certiorari to the Supreme Court of the United States;

(3) Affidavit of Service.

Thomas W O'Toole
THOMAS W. O'TOOLE
Federal Public Defender
District of Arizona

SUBSCRIBED AND SWORN to before me this 8th day of June, 1978, by Thomas W. O'Toole.

Marcia D. Gandara
Notary Public

My Commission Expires: June 14, 1981.

FILED

MAY 12 1978

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. BENSON JOSEPH DONOHO, Appellant.	)	No. 77-1999 OPINION

Appeal from the United States District Court for the District of Arizona

Before: BARNES and CHOY, Circuit Judges, and LYDICK,* District Judge

PER CURIAM:

Appellant was convicted of Counts Four, Five and Six of a six-count indictment. In Count Four, he was charged with violation of 26 U.S.C. §5861(d) (possession of unregistered firearm); in Count Five with violation of 26 U.S.C. §5861(i) (possession of an unserialized firearm); and in Count Six with violation of 26 U.S.C. §5861(e) (transfer of firearm without written application). In each count, 26 U.S.C. §5871 was charged to establish the penalty for the crimes, and 18 U.S.C. §2 was also added to Counts Four and Five to charge the aiding and abetting of the alleged crime. During the course of the trial, the Court dismissed the first three counts of the indictment and renumbered the last three as Counts One, Two and Three. All counts related to the possession or transfer of a .22 caliber Maxim silencer on November 17, 1975.

This Court has jurisdiction of this appeal under

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*The Honorable Lawrence T. Lydick, United States District Judge, Central District of California, sitting by designation.

28 U.S.C. §1291.

Appellant presents three issues for our review:

1. Did the District Court err in excluding character testimony relating to specific instances of appellant's conduct?

2. Did the District Court err in denying defendant's motion for judgment of acquittal based on the "procuring agent" theory? and

3. Did the District Court err in allowing the Government to impeach the defendant by proof of a prior misdemeanor theft conviction?

I

CHARACTER EVIDENCE

The defense attempted to establish defendant's character by introducing testimony of specific instances of conduct which would have reflected favorably on appellant. The trial court ruled such testimony inadmissible. Whether that decision was correct depends upon the application of FED. R. EVID. 405(b) to the facts of this case.

Rule 405(b) provides that "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may . . . be made of specific instances of conduct." At trial appellant raised the defense of entrapment. If character or a trait of character is an essential element of the defense of entrapment, then the District Court should have admitted relevant testimony of specific instances of conduct.

But character or a character trait is not an essential element of the entrapment defense. That defense has two elements: a government official must have induced the defendant to commit the crime; and the defendant must

not have been predisposed to commit the crime. Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). Neither element concerns character or a character trait. The inducement concerns actions taken by persons other than the defendant, and the predisposition concerns the defendant's state of mind prior to the inducement.

We recognize that proof of character may be relevant to the entrapment defense because it may make more probable than not that a defendant possessed a certain state of mind. It is the state of mind itself, however, and not the method of proving the state of mind, which operates as an essential element of the defense. Moreover, predisposition may be shown by methods other than proof of character, including proof of prior similar conduct and convictions for prior similar conduct. Whiting v. United States, 296 F.2d 512 (1st Cir. 1961), cert. denied 375 U.S. 884 (1963); Carlton v. United States, 198 F.2d 795, 797 (9th Cir. 1952); Pulido v. United States, 425 F.2d 1391, 1393-94 (9th Cir. 1970); but see United States v. McClain, 531 F.2d 431, 435-437 (9th Cir.), cert. denied 429 U.S. 835 (1976) (hearsay testimony inadmissible to show predisposition in the absence of exception to the hearsay rule). Because proof can be made by several methods, character is not even an essential method of proof, much less an essential element of the defense itself.

Even if character were an essential element of an entrapment defense, proof of character would still be subject to the restraints of relevance. United States v. Ambrose, 483 F.2d 742, 748 (6th Cir. 1973). Much of the testimony concerning specific acts of the defendant was remote and the

District Court was well within its discretion in ruling it not relevant. The jury was properly instructed as to the elements of entrapment and reasonably could have concluded that there was none here. United States v. Gonzales-Benitez, 537 F.2d 1051 (9th Cir.), cert. denied 429 U.S. 923 (1976). We find no error in the District Court's ruling as to the character evidence.

II

THE "PROCURING AGENT" THEORY

Appellant next urges that the trial court should have acquitted him because he acted only as an agent in procuring the illegal firearms and delivering them to another person. We disagree.

In Vasquez v. United States, 290 F.2d 897, 898 (9th Cir. 1961), we recognized the Third Circuit's decision, United States v. Prince, 264 F.2d 850 (3d Cir. 1959), that a procuring agent for a purchaser could not be convicted of a sale of heroin. However, we declined there to decide whether the same rule applied to a charge of facilitating the sale of heroin, and found no reversible error despite the procuring agent theory urged by the defendant. Later, the procuring agent theory was specifically rejected by this Court in United States v. Hernandez, 480 F.2d 1044 (9th Cir. 1973) insofar as the distribution of controlled substances is concerned, this Court noting that the law of this Circuit provides that a procuring agent properly may be convicted of facilitation of transfer or sale. Id. at 1046-1047.

Counts One and Two here deal only with the possession of a certain type of firearm and not the sale, transfer or delivery thereof. Because the prosecution clearly established the elements of possession, United States v. Freed,

401 U.S. 601 (1971), the procuring agent theory could apply only to Count Three. Inasmuch as the sentences on the three counts were identical and to run concurrently, the alleged error would be harmless because it could not affect or control the convictions for the first two counts. In any event the trial court properly submitted the third count to the jury because appellant could have been convicted on that count as a procuring agent. Furthermore, the jury reasonably could have concluded that appellant was not merely a procuring agent. For all these reasons, the trial court did not err in denying the motion for judgment of acquittal.

III

PRIOR MISDEMEANOR CONVICTION

Appellant last urges that the Government's use of a prior misdemeanor conviction to impeach his testimony constituted reversible error. The conviction was for petty theft, which involved the taking of a gun from his employer in 1971.

The governing rule is FED. R. EVID. 609(a) which provides:

> "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment."

Most crimes involve dishonesty, but dishonesty has assumed a special meaning in the context of FED. R. EVID. 609(a). It refers to the inclination not to tell the truth.

Conviction of crimes such as perjury, false statement, fraud, embezzlement or false pretense suggest that the witness, once having deceived, lied, or falsified, may do so again. House-Senate Conference Committee Notes to Federal Rule of Evidence 609; United States v. Ortega, 561 F.2d 803 (9th Cir. 1977). Accordingly, convictions for those types of crimes, even though they may be misdemeanors, properly may be used to impeach a witness.

Appellant's prior conviction was for the violation of 5 Ariz. Rev. Stats. §§13-661, 13-663B, and 13-661B. Section 13-661 includes as one of the categories of theft the knowing and designing defrauding of a person of money, labor or property through any false or fraudulent representation or pretense. Section 13-661B provides that "[a]ny false or fraudulent representation or pretense shall be treated as continuing so as to include any money, property or service received as a result thereof. . . ." The inclusion of section 13-661B in the conviction makes it clear that appellant's theft was based on a false and fraudulent representation or pretense, notwithstanding that the value of the article stolen made the theft classified as petty (§13-663B). The prior conviction therefore was for a crime which involved dishonesty as that term is used in FED. R. EVID. 609(a). The District Court did not err in admitting the evidence of the prior conviction.

The judgment of the District Court is AFFIRMED.